

1986

State of Utah v. Richard Lawrence Jensen : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, : Case No. 21028
-v- :
RICHARD LAWRENCE JENSEN, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT
- - - - -

APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY,
A FIRST DEGREE FELONY, IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE JUDITH BILLINGS,
JUDGE, PRESIDING.

SUPREME COURT

1986 21028

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue in this appeal is whether defendant's conviction should be reversed based upon an allegedly erroneous ruling by the trial court on the admission into evidence of two letters written by defendant which purportedly contained references to a prior crimes.

STATEMENT OF THE CASE

Defendant, Richard Lawrence Jensen, was charged with aggravated robbery, a first degree felony, under UTAH CODE ANN. § 76-6-302 (1978) (R. 11). After trial, a jury found defendant guilty as charged (R. 43). The trial court sentenced defendant to a term of five years to life, with a one year enhancement to run consecutively, at the Utah State Prison (R. 101).

STATEMENT OF FACTS

After a jury trial, defendant was convicted for an aggravated robbery that occurred on February 11, 1985 at a Radio Shack store in Salt Lake County (R. 43, 150-55). At trial, the State offered as evidence two letters written by defendant to a woman with whom he was romantically involved (State's Exhibits 16

and 17; R. 274, 283).¹ The following exchanges occurred with respect to Exhibit 16:

Q. (By Mr. Iwasaki) [The Prosecutor]: Miss Harris, I show you what's been marked State's proposed Exhibit 16S. That's a letter written to you by the defendant, Larry Jensen, isn't that correct?

A. Yes.

Q. In fact, he wrote that to you and it was delivered to you and you read it, isn't that correct?

A. Yes.

Q. And that is a letter that you voluntarily gave to Ralph Tolman who in turn gave it to me; is that correct?

A. Yes.

Q. Thank you. Now, isn't it true that in that letter that Larry wrote to you "Yes, I do need your help?"

A. Yes.

Q. And is it also true he stated, "When we went to your sister's home was on Sunday, February 10th?"

A. Yes.

Q. And did he also state, "If you remember right February 11th was the Monday night I left you the key to my apartment so you could wait for me until I came back from the Spa?"

A. Well, that's his--yes.

Q. Did he further write"--

¹ These exhibits, the admissibility of which defendant challenges on appeal, were not made part of the record on appeal by defendant (R. 108). However, the State has supplemented the record with the exhibits so that the Court may review them in rendering a decision. Copies of the exhibits are contained in the Addendum to this brief.

MS. NESSET-SALE [Defense Counsel]: Your honor, object to proceeding this way. I think if he wants the procedure requires he allow her to read the document that he has to see if it refreshes her memory. She has not responded negatively on these things.

MR. IWASAKI: Your honor, this isn't being offered to refresh her recollection. We offer it as bearing upon her credibility. She's testified Larry did not write her and tell her what was about [sic] the events of February 11th. And I think this certainly shows that is not the case.

JUDGE BILLINGS: The Court objects to you reading from something that's not been offered into evidence. Do you intend to offer that document?

MR. IWASAKI: I do, your honor.

JUDGE BILLINGS: Let's get that taken care of. Do you have an objection?

MS. NESSET-SALE: I do.

JUDGE BILLINGS: What is your objection? Do you wish to approach the bench?

MS. NESSET-SALE: I do.

(Whereupon, a discussion was held between Court and counsel at the bench, outside the hearing of the jury, after which the following proceedings were had):

JUDGE BILLINGS: What is that document marked?

MR. IWASAKI: Your honor, State would move for admission of State's Exhibit No. 16S.

JUDGE BILLINGS: It will be received.

MS. NESSET-SALE: Over our objection, you honor, for reasons given.

JUDGE BILLINGS: Yes, noted.

(Whereupon, State's Exhibit 16 was offered and received into evidence).

(R. 274-76). And, with respect to Exhibit 17, the following took place:

Q. (By Mr. Iwasaki) Show you what's been marked as State's proposed Exhibit 17S and ask you that is, in fact, the letter written by Larry and delivered to you; is that correct?

A. Yes.

Q. And do you recognize that as such?

A. Yes.

Q. And that was in your possession until you gave it to Mr. Tolman of our office, isn't that correct?

A. Yes.

MR. IWASAKI: Thank you. I move for the admission of State's proposed Exhibit 17S for the same reasons I moved for the admission of No. 16S.

MS. NESSET-SALE: May I see that, your honor?

JUDGE BILLINGS: If you'll show it to counsel.

MR. IWASAKI: I will point out Ms. Nessel-Sale was provided copies of all of these letters prior to the trial.

MS. NESSET-SALE: I just don't know which one you have.

JUDGE BILLINGS: Then if counsel wish to approach the bench if Ms. Nessel-Sale has an objection to this exhibit.

MS. NESSET-SALE: I simply have the same objection as before. I think she can respond to everything that's in that.

JUDGE BILLINGS: I'm going to have to look at this one. The objection will be overruled. State's Exhibit 17S will be received.

(Whereupon, State's Exhibit No. 17 was offered and received into evidence).

(R. 283-84). Finally, after the jury had retired for deliberations, defendant's counsel objected to having Exhibits 16 and 17 taken into the jury room. She stated that certain parts of the letters were objectionable because they were related to private matters or referred to a prior misdemeanor offense committed by defendant. As an explanation for the late objection, counsel claimed to have misunderstood the "limitations" the court had placed upon the admission of the letters (R. 397-400). The court overruled the objection, ruling that defendant had not raised a timely objection to the exhibits, prior to their admission, on the grounds subsequently raised. The court said:

The limitations the court feels were quite clear. And Mr. Iwasaki could not ask the questions about the second letter, that he was prohibited from asking about the first letter as the court's feeling is that it was clear that these documents were received, that documents that were received go to the jury and if counsel had any objection that should have been brought up at that time before the documents were received then the court could have made an intelligent decision as to what portion would be received, what portion would be expunged, that at this point the court has no choice but to stand by her prior ruling and that those documents were received as the case proceeded. The documents were received and there is no way to reverse that. And the court will stand by her prior ruling and the documents will go to the jury.

(R. 400-01).

On appeal, defendant contends that his conviction should be reversed based upon this allegedly erroneous evidentiary ruling.

SUMMARY OF ARGUMENTS

Because defendant failed to comply with the contemporaneous objection rule at trial, this Court should not address his claim of evidentiary error. Furthermore, even if the Court were to analyze his contention under the plain error rule, the claim is without merit.

ARGUMENT

POINT I

DEFENDANT IS NOT ENTITLED TO A REVERSAL OF HIS CONVICTION BASED UPON THE TRIAL COURT'S ALLEGEDLY ERRONEOUS ADMISSION INTO EVIDENCE OF TWO LETTERS WRITTEN BY DEFENDANT; HE WAIVED THAT ISSUE BY FAILING TO COMPLY WITH THE CONTEMPORANEOUS OBJECTION RULE AT TRIAL. AND, THE TRIAL COURT DID NOT COMMIT PLAIN ERROR.

In State v. Gray, 717 P.2d 1313, 1316 (Utah 1986), this Court, citing Utah R. Evid. 103(a)(1), made clear that, before it will rule on claims of evidentiary error, "the record must reflect a timely objection, stating the specific ground upon which it is based." The record in defendant's case does not reflect a timely and specific objection to the evidence he challenges on appeal. The trial court correctly noted and relied upon this deficiency in overruling defendant's late objection to the letters, which was not made until after the jury had retired. Defense counsel's explanation for the tardy objection was unpersuasive. As noted by the prosecutor, counsel had been

provided copies of both of the letters prior to trial (R. 284). Thus, she had adequate opportunity to review and become aware of the contents of the letters. Accordingly, based upon waiver, this Court should refuse to address defendant's claim of evidentiary error.

Furthermore, it is well settled that "the trial court's ruling on the admissibility of evidence will not be reversed absent a showing that the trial court so abused its discretion as to create a likelihood that injustice resulted." State v. Royball, 710 P.2d 168, 169 (Utah 1985). Accord Gray, 717 P.2d at 1316. Therefore, even if the Court were to consider defendant's contention pursuant to the plain error rule, Utah R. Evid. 103(d), his claim that the State was allowed to present evidence of a prior crime in violation of Utah R. Evid. 404(b) is without merit. A review of the letters in issue (see Addendum) reveals nothing but a vague reference to defendant's father going to Davis County to speak with a judge about reviewing defendant's case. That appears in Exhibit 16-S in two short sentences:

He [defendant's father] is going out to
to Davis County [and] talk with that
judge. I'm eligable [sic] for a
'review' now so things look good out
there.

There is little chance that the jury would naturally and necessarily construe this statement as a clear reference to a prior crime committed by defendant. Therefore, the trial court did not plainly violate Rule 404(b) when it admitted the challenged letters into evidence, and its ruling should be affirmed. Gray, 717 P.2d at 1316; Royball, 710 P.2d at 169.

CONCLUSION

Based upon the foregoing arguments, defendant's conviction should be affirmed.

RESPECTFULLY submitted this 1st day of August, 1986.

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CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Brief were mailed, postage prepaid, to Earl Xaiz, Yengich, Rich, Xaiz & Metos, Attorneys for Appellant, this 1st day of August, 1986.

David B. Thompson

ADDENDUM

STATE'S EXHIBIT 16-S

Friday

Dear Terri,

Thank for your letter. Sounds like things are going well for you. Do go to that school 'cause you can use that training for the rest of your life. I know you'll do well.

Yes, I do need your help. When we went to your sisters' house was on Sunday Feb 10. If you remember right, Feb 11 was the Monday night I left you the key to my apartment so you could wait for me until I came back from the spa. You got to my apartment around 4:30pm so you didn't have to deal with the five-o'clock traffic, and I arrived shortly after. We just sat around & watch T.V. & had a few beers. If you remember right, since you & I have been seeing each other we've been together every Monday, 'cause that is both of our day off. And we've been getting together since just after New Years.

You don't have to get too technical or elaborate on your story, just keep it simple & don't let them confuse you. The only thing they'll try to trip you up on, is the time. Just stick to your story. My lawyer or his investigator will be getting a hold of you to help you out. I really appreciate your concern. Tell my lawyer the reason you haven't come forward sooner is that I didn't want you to get involved if at all possible. Remember he's on my side. He'll help you out.

Yes, I've been doing alot of exercising. Around 500 pushups a day, 150 situps. We get recreation two times a week, so I get to lift some weights & play basketball. I've lost about twenty pounds in here & have cut up alot. You'll be surprised at my stomach. It's really cut up.

We are pressing charges against Dave. I called the Detectives today & they were going to his house. So

it looks like he should be in here soon. I've got a couple of guys waiting for him in here.

Well my dad came up here & visited me last Tuesday. He was a little upset. But we had a good visit. He is going out to Davis County & talk with that judge. I'm eligible for a 'review' now so things look good out there.

Babe, I'm sorry for the way I've been acting & some of the things I've wrote in my letters. Just being in here & not being able to talk to you has been real hard on me. I think about you alot & hope you'll still be around when I get out. I have good feelings about you & you're definitely my type. I hope we can get to know each other even better. If you still want to get a place when I get out we will. Believe me, I won't try to tie you down & wherever you want to go out with is fine.

It would just be more economically & beneficial to us. Let's get a two-bedroom with a fireplace. I'm sure we can get along fine. Thought I'd just breeze this idea over you. You know I won't be mad if you don't what to, 'cause you might have other plans.

I heard the 'Buzzer' is supposed to open again. Do you know anything about it? Please call MAC Truck Bids or Katherine & find out what happened to my 'check'. They still have it sent it to me. OK. Have you like this picture on the envelope. You know I can be a little devil sometimes huh?

Love you babe, & can't wait to see & be with you again. Try write a little bigger letters & tell me what's happening. Even if it's with Chad. OK?

Love Ya, Always

any more news. I'll have my sister call you. Write back soon, & visit if you can. Wednesday you can visit between 1-4 & 6-9. Saturday 1-4 -

Fanny
O

STATE'S EXHIBIT 17-S

Dear Teei,

Your letters always make me feel so good. You are a sweetheart to visit me & support me. I feel I've let a lot of people down including you. But you've been real cool through everything.

I just got involved with a real low-life named Dave. But it looks like he is going to get his just reward anyway. This whole situation seems like a dream & not real.

I thought this kind of thing only happens in the movies. Wrong? Those detectives are trying hard to get a conviction. If you're still planning to take the stand on my behalf, just keep it very simple and don't get frustrated. Remember there is no way they can call you a liar. He'll just try to make you nervous, but the jury will understand that. And only two out of the twelve will have to have 'reasonable doubt' for me to walk.

Sorry about your dog. That was a real cute dog. Wish I'd been around to comfort you.

Teei, I had this dream the other night and when I woke up I was hoping you were lying next to me. 'Cause in my dream we were living & loving all our greatest fantasies. (I'll let you use your imagination). It seems so real. You're in my thoughts daily. Don't think just because I locked up is the main reason I think about you.



'Cause I was hooked on you the first time I saw you, but for some reason I went out of my way to ignore you, 'cause I knew I could fall for you. Plus I thought you were real serious about your boyfriend. I remember on New Year's Eve I wanted to kiss you so bad, but you were busy.

Babe, I feel real good about you too, and know things can be real good between us. I am quite a bit older than you and sometimes think about that. But it doesn't seem to bother you. I know, you're just hooked on my hairy chest huh! And I thought it was my great personality. Oh well.

Take care of yourself and come and see me when you can. Just remember I care a lot for you, and want to be with you. I want to give our relationship a real serious try. 'Cause I believe you & I have a lot in common & have the same interests & desires it takes to succeed in a serious friendship.

Love You, Always

Jimmy

P.S. My court date is June 5th at 10:00 am. xxooxxooxxx

P.S.S Love You, Lots!